

Decision **PROPOSED DECISION OF ALJ COLBERT** (Mailed 3/6/2015)

**BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA**

Application of California-American Water Company (U210W) for Authorization to Increase its Revenues for Water Service by \$18,473,900 or 9.55% in the year 2015, by \$8,264,700 or 3.90% in the year 2016, and by \$6,654,700 or 3.02% in the year 2017.

Application 13-07-002  
(Filed on July 1, 2013)

**DECISION IMPOSING SANCTIONS FOR VIOLATION OF RULE 1.1 OF THE  
COMMISSION'S RULES OF PRACTICE AND PROCEDURE**

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**DECISION IMPOSING SANCTIONS FOR VIOLATION OF RULE 1.1 OF THE COMMISSION'S RULES OF PRACTICE AND PROCEDURE****Summary**

This decision finds that California-American Water Company violated Rule 1.1 of the Commission's Rules of Practice and Procedure by failing to file accurate Minimum Data Requirements in its General Rate Case application and not promptly correcting this material misstatement. The integrity of the regulatory process relies on the accurate and prompt reporting of information. The scope of the discrepancy between information initially provided by California American-Water Company in the Minimum Data Requirements and information provided in response to the Office of Ratepayer Advocates' data requests is so severe, California-American Water Company is ordered to pay a penalty of \$870,000 to the General Fund of the State of California.

**1. Background**

On July 1, 2013, California-American Water Company (Cal-Am) filed a general rate case (GRC) Application (A.) 13-07-002 with the Commission. Pursuant to the Revised Rate Case Plan for Class A water utilities, the GRC application included Minimum Data Requirements (MDRs).<sup>1</sup> As part of requirements under MDR II.D.5, Cal-Am listed five projects authorized in prior GRCs but not built. The purpose of MDR II.D.5 is to provide accurate and non-controversial information to the Commission in the utility's GRC filing to promote sound decision-making.<sup>2</sup> Cal-Am submitted the hundred-days update to the above captioned GRC application on October 9, 2013.

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<sup>1</sup> See Decision (D.) 07-05-062.

<sup>2</sup> D.07-05-062, Attachment 1 at A-21.

On November 12, 2013, the Office of Ratepayer Advocates (ORA) filed a motion requesting that the Commission issue an Order Instituting Investigation (OII) against Cal-Am for “misleading the Commission or its staff by an artifice or false statement of fact or law” under Rule 1.1 of the Commission’s Rules of Practice and Procedure (Rules).<sup>3</sup> ORA’s motion followed a site visit where ORA discovered a number of projects that Cal-Am failed to disclose as part of MDR II.D.5. ORA subsequently issued a data request.

Cal-Am’s response to ORA’s data request revealed that the number of projects authorized in prior GRCs but not built was actually 62 and not the five that Cal-Am originally disclosed in its GRC filing A.13-07-002. Of the 62 projects, four had been revealed in Cal-Am’s original GRC filing. Thus, one project that had been revealed in Cal-Am’s original GRC filing was not present as part of the 62 projects Cal-Am listed in its response to ORA’s data request.

ORA requested the Commission issue an OII in order to investigate Cal-Am’s MDRs submittal, specifically Cal-Am’s response to MDR II.D.5. ORA contended that Cal-Am incorrectly disclosed projects that received funding in a prior GRC but were not constructed, as required under D.07-05-062. ORA stated that the discrepancy between the number of projects Cal-Am revealed in its GRC filing and the actual number was so severe that it amounted to a Rule 1.1 violation.

On November 27, 2013, Cal-Am filed a response to ORA’s motion. Cal-Am asserted it “did not act intentionally, recklessly, or with gross

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<sup>3</sup> Unless otherwise indicated, all references to Rules are to the Commission’s Rules of Practice and Procedure.

negligence” and that its conduct did not constitute a Rule 1.1 violation.<sup>4</sup> Cal-Am contended that its interpretation of the Rate Case Plan only required disclosure of MDRs for test years 2011-2012. Cal-Am explained that it only listed the five projects that were currently “on hold” in its MDRs because it believed “there was a good chance that they would not be built.”<sup>5</sup> Therefore, Cal-Am did not submit 58 projects that were 1) scheduled for completion in 2013 and 2014, 2) submitted by Advice Letter, or 3) multi-year projects. Cal-Am stated that all the information concerning the 58 projects was provided in other parts of its testimony.

On December 9, 2013, ORA filed a reply to Cal-Am’s response. ORA stated that Cal-Am’s interpretation of the MDRs under the Rate Case Plan was incorrect. According to ORA, the MDRs rules under D.07-05-062 are clear and Cal-Am must state all capital improvement projects approved in test years but not built, regardless of when Cal-Am believed that the projects would be completed. Therefore, according to ORA, Cal-Am’s interpretation of the MDRs inappropriately limited the scope of the information that Cal-Am submitted.

A Prehearing Conference was held on January 21, 2014. The assigned Administrative Law Judge (ALJ) addressed ORA’s motion requesting the Commission issue an OII. The ALJ raised the possibility and parties discussed the proposition of an Order to Show Cause (OSC) in this proceeding as opposed to a separate OII proceeding.

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<sup>4</sup> Response of California-American Water Company to the Motion of the Office of Ratepayer Advocates for a Companion Order Instituting an Investigation Regarding California-American Water Company’s Responses to Minimum Data Requirements and Whether the Company Violated Rule 1.1, filed November 27, 2013 (Cal-Am’s Response), at 11.

<sup>5</sup> *Id.* at 6.

On February 21, 2014, the assigned ALJ issued a ruling denying ORA's motion for an OII and instead directed Cal-Am to show cause why it should not be found in violation of Rule 1.1. In the event that Cal-Am was found in violation of Rule 1.1, Cal-Am was to show cause why it should not be liable for penalties and sanctioned. The ruling stated that, based on preliminarily determined facts, there was a reasonable basis to conclude that Cal-Am misrepresented material facts to the Commission.

On March 6, 2014, the assigned ALJ convened an OSC hearing to show cause why Cal-Am should not be sanctioned for violating Rule 1.1. Cal-Am presented its manager of capital assets and planning, Mark Schubert, who testified that he "was directly involved in the preparation of ... [the] response" to ORA's data request RRA-001. RRA-001 sought information on Cal-Am projects authorized in the prior GRC but not built.<sup>6</sup> Richard C. Svindland, Vice President, Director of Engineering, and David P. Stephenson, Director of Rates for Cal-Am, also testified on related issues and were subject to cross-examination by parties.

Parties submitted post-hearing briefs on March 17, 2014, and reply briefs on March 28, 2014. ORA recommended a maximum fine of \$2.9 million calculated by multiplying 58 violations by the maximum penalty of \$50,000.<sup>7</sup> The 58 violations represented new projects disclosed in ORAs data request but not included in the MDRs. Cal-Am contended that no fine was warranted because it had been cooperative and had not misled the Commission either intentionally, recklessly or with gross negligence.

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<sup>6</sup> OSC Hearing Transcript (Hearing Tr.), March 6, 2014 at 16:19-20.

<sup>7</sup> Public Utilities Code (Pub. Util. Code) Section 2107.

## 2. Discussion

### 2.1. Did Cal-Am's actions constitute a Rule 1.1 violation?

Rule 1.1 states, in relevant part, as follows:

Any person who signs a pleading or brief...or transacts business with the Commission, by such act...agrees to comply with the laws of this State; to maintain the respect due to the Commission...and its Administrative Law Judges...*and never to mislead the Commission or its staff by an artifice or false statement of fact or law.* (Emphasis added.)

Pub. Util. Code § 702 states, in pertinent part:

Every public utility shall obey and comply with every order, decision, direction, or rule made or prescribed by the Commission in the matters specified in this part, or any other matter in any way relating to or affecting its business as a public utility, and shall do everything necessary or proper to secure compliance therewith by all of its officers, agents, and employees.

Utility compliance with Commission rules is absolutely necessary to the proper functioning of the regulatory process. Disregarding a statutory or Commission directive, regardless of the effects on the public, merits a high level of scrutiny as it undermines the integrity of the regulatory process.<sup>8</sup>

The purpose of Rule 1.1 is to preserve the integrity of the Commission's process and to provide an enforcement tool to address situations when parties that practice before the Commission do not provide truthful, accurate, or complete information. The Commission's Rate Case Plan MDR II.D.5 for water utilities requires applicants to provide a "list of the plant improvements

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<sup>8</sup> D.98-12-075 at 56.

authorized in the test years but not built.”<sup>9</sup> Pursuant to the Rate Case Plan, Cal-Am’s MDRs responses must be accurate as of Cal-Am’s filing date.

In the MDRs response filed on July 1, 2013, Cal-Am disclosed five plant improvements that were authorized in test years from the prior GRC but were not built. On October 1, 2013, ORA issued data request RRA-001 seeking information on the “numerous projects authorized in A.10-07-007,” Cal-Am’s prior GRC, that were “delayed, determined unnecessary, postponed indefinitely, but not built.”<sup>10</sup> Cal-Am’s response to the data request identified 62 projects, four of which had been identified in Cal-Am’s MDRs submittal and one of which was no longer included in the 62 projects submitted by Cal-Am. Cal-Am stated that the discrepancy between the information provided in the MDRs and the information provided in ORA’s data request response was because Cal-Am “believed that ORA and the Commission were interested in projects that likely would not be built, not projects that had simply run behind schedule.”<sup>11</sup> ORA stated that, “Cal-Am chose to only include a small number of projects a Cal-Am engineer thought would never be built, an interpretation that is contrary to the plain language of the MDRs.”<sup>12</sup>

There is no dispute that Cal-Am’s response to the data request failed to disclose information on all projects authorized in test years but not built. As

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<sup>9</sup> D.07-05-062, Appendix A-27.

<sup>10</sup> Exh. OSC-2, California American Water Response to DRA Data Request RRA-001 (RRA-001) (emphasis in original).

<sup>11</sup> *California-American Water Company Post-Hearing Brief on the Order to Show Cause*, filed March 17, 2014 (Cal-Am Opening Brief) at 4.

<sup>12</sup> *Brief of the Office of Ratepayer Advocates Regarding the Administrative Law Judge’s Order to Show Cause Regarding California-American Water Company’s Violation of Rule 1.1*, filed March 17, 2014 (ORA Opening Brief) at 2.

noted at the OSC hearing, “Cal-Am admitted that all the information that could have been provided wasn’t.”<sup>13</sup> Instead of Cal-Am listing in the MDRs all projects authorized in test years but not built, Cal-Am chose to include only five projects that Cal-Am thought would not be built in 2013. During evidentiary hearings, Cal-Am’s manager of capital assets and planning, Mark Schubert, testified that at the time of the hundred-days update the MDRs were inaccurate and there was no action taken to clarify, update, or provide the most recent accurate information in the MDRs.<sup>14</sup> On cross examination by ORA, Schubert admitted multiple times he excluded projects in the MDRs that were still in progress but that he believed would be built.<sup>15</sup> Further, Schubert admitted that this exclusion was “not an accident.”<sup>16</sup> Finally, Cal-Am admitted at the hearings that 2013 was a test year even though Cal-Am previously stated that it need not have included projects set for completion in 2013 in its MDRs response because 2013 was not a test year.<sup>17</sup>

Cal-Am also argued that it did not conceal the fact the 62 projects in question were not built. Cal-Am argued that the testimony, work papers, and Strategic Capital Expenditure Plans (SCEP) included this information.<sup>18</sup> However, D.07-05-062 does not permit such information to be provided in a separate part of a utility’s application other than the MDRs. Cal-Am has no basis

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<sup>13</sup> Hearing Tr. at 92:7-9.

<sup>14</sup> *Id.* at 36:17-27.

<sup>15</sup> *Id.* at 58:5-9, 65:11-15.

<sup>16</sup> *Id.* at 65:11-18.

<sup>17</sup> *Id.* at 16:28-17:1-2.

<sup>18</sup> Cal-Am Opening Brief at 9.

to presume how Commission staff may or may not apprehend, retain, relay, or crosscheck information gleaned from distinct sections of an application that is thousands of pages long and is provided for other independent data gathering purposes. No party should take it upon itself to selectively limit responses to MDRs based on its own presumptions of what the Commission or staff may or may not already know from other sources.

Furthermore, the data response Cal-Am submitted to ORA made no cross-reference to the information contained in other sections of the application. There was no indication that information in different sections revealed additional projects that were not listed in the MDRs response.<sup>19</sup> Cal-Am's disclosure of 58 authorized projects that were not constructed during the test years became apparent to the Commission only after ORA conducted a site inspection and issued a subsequent data request. The fact that a party initially withholds information from the Commission for a particular purpose and subsequently discloses the information in a different or unrelated context does not mean that the initial nondisclosure was unintentional. We therefore conclude that the failure to disclose a list of all authorized projects approved in the prior GRC but not built constitutes a Rule 1.1 violation. The timing or manner in which information is disclosed would have a material effect on the outcome desired by the disclosing party. If a party is able to simply claim ignorance of the initial omission, the party would benefit from the initial nondisclosure and escape any sanctions or penalties.

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<sup>19</sup> *Id.* at 40:18-21.

As we have noted in previous decisions, there is no “intent, recklessness or gross negligence” requirement to a Rule 1.1 violation, either implicitly or explicitly.<sup>20</sup> We have previously held that Rule 1.1 violations have occurred where there has been a lack of candor, withholding of information, or failure to correct information or respond fully to data requests.<sup>21</sup> As further explained in D.13-12-005, the question of intent to deceive merely goes to the question of how much weight to assign to any penalty that may be assessed.<sup>22</sup>

We find Cal-Am’s explanation for not disclosing the 58 projects authorized in the test years but not built in its MDRs submittal to be unsatisfactory. Cal-Am’s purported interpretation of the MDRs data request is unduly narrow. The plain language of the MDRs is clear and direct; a list of all the project improvements authorized in the test years but not built needs to be provided. The intent of the MDRs is to allow staff to gain a comprehensive picture of how Cal-Am manages ratepayers’ money in constructing new projects. Cal-Am has a duty to this Commission and its ratepayers to demonstrate that ratepayer-funded projects are in fact being built and that it responsibly manages ratepayers’ money. The status of the 58 projects authorized in test years but not built was within Cal-Am’s possession at the time the MDRs was submitted. Cal-Am should have identified, in its MDRs submittal, the 58 projects authorized in test years but not completed in order to provide a complete picture of how Cal-Am manages ratepayers’ money in constructing new projects.

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<sup>20</sup> See D.93-05-020, D.92-07-084, D.92-07-078, D.01-08-019, and D.13-12-053.

<sup>21</sup> *Id.*

<sup>22</sup> D.13-12-053 at FN 25; See D.01-08-019.

Finally, we note the significance of the information provided in MDRs, which is to help staff verify that Cal-Am is completing its authorized projects to the benefit of ratepayers. The MDRs is an important method to track the accuracy of Cal-Am's project forecasts and the completion of ratepayer-funded projects on schedule and to the benefit of ratepayers. The Commission and its staff rely on the utilities to provide accurate information pertaining to the status of an authorized project because the utility is the entity that has access to such information. MDRs are meant to streamline the formal discovery process during a GRC or a cost of capital proceeding.<sup>23</sup> Therefore, providing inaccurate information sandbags parties and impedes the Rate Case Plan process. Given the importance the Commission and its staff attach to Cal-Am's MDRs submittal, Cal-Am's omission of information pertaining to the status of authorized projects from the MDRs was critical.

Because the MDRs presented by Cal-Am for filing with the Commission on July 1, 2013, did not contain complete and accurate information, it constituted an artifice, within the meaning of Rule 1.1, that misled the Commission. Moreover, by omission, Cal-Am's failure to disclose the 58 unbuilt projects mislead the Commission by allowing a "false statement of fact," within the meaning of Rule 1.1, to remain uncorrected even though Cal-Am had the knowledge to correct it from the onset. The misleading nature was exacerbated by Cal-Am's failure to include cross-reference information contained in other sections of its application, which the utilities are required to do.

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<sup>23</sup> D.07-05-062 at 21.

In view of Cal-Am's failure to disclose in its MDRs submittal of all project improvements authorized in test years but not built, and Cal-Am's failure to promptly correct this material misstatement, we find Cal-Am in violation of Rule 1.1.

## **2.2. Assessment of Sanctions and Penalties**

The Commission's authority to impose penalties on Cal-Am for Rule 1.1 violations is provided in Pub. Util. Code § 701. § 701 states that the Commission is "empowered to supervise and regulate every public utility in the State and may do all things which are necessary and convenient in the exercise of such power and jurisdiction."<sup>24</sup> The Commission is required by law to ensure that the provisions of the Constitution and statutes of this State that affect public utilities are enforced and obeyed, and that violations are promptly prosecuted and penalties are recovered.<sup>25</sup> Cal-Am is subject to the rules and requirements of this Commission because it is a public utility provider within California. The Commission may impose a fine of up to \$50,000 for each offense under Pub. Util. Code § 2107.

To determine the size of the penalty for Cal-Am's Rule 1.1 violation, we rely on the criteria adopted by the Commission in D.98-12-075, and Pub. Util. Code § 2107.<sup>26</sup> As stated in D.98-12-075, two general factors are considered in setting fines: (1) the severity of the offense and (2) the conduct of the utility. In

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<sup>24</sup> See also, Calif. Constitution, Article 12, Sec. 6.

<sup>25</sup> Pub. Util. Code § 2101.

<sup>26</sup> D.98-12-075 indicates that the principles therein distill the essence of numerous Commission decisions concerning penalties in a wide range of cases, and the Commission expects to look to these principles as precedent in determining the level of penalty in a full range of Commission enforcement proceedings. (Mimeo. at 34-35.)

addition, the Commission considers the financial resources of the utility, the totality of the circumstances in furtherance of the public interest, and the role of precedent.<sup>27</sup> In deciding the amount of a penalty, the Commission also considers the sophistication, experience and size of the utility; the number of victims and economic benefit received from the unlawful acts; and the continuing nature of the offense.<sup>28</sup>

Based on the application of these criteria, we conclude that a penalty of \$15,000 per violation is appropriate here. In terms of the size of the penalty per offense, an element of discretionary judgment is involved. In view of the severity of the offense, conduct of the utility, financial resources, and prior precedent, we conclude that the amount of penalty per offense should be set near the middle of the allowable range.

In accordance with Pub. Util. Code § 2108, we shall apply the \$15,000 penalty per violation to each separate offense committed by Cal-Am. Under Pub. Util. Code § 2108, "every violation of the provisions of this part or of any part of any order, decision, decree, rule, direction, demand, or requirement of the commission, by any corporation or person is a separate and distinct offense, and in case of a continuing violation each day's continuance thereof shall be a separate and distinct offense."

We shall measure the number of offenses at issue here in terms of each separate data element that Cal-Am failed to disclose in its MDR.II.5 submittal. Since the MDRs required disclosure of all Cal-Am projects authorized in the test years but not built, the failure to provide information on each authorized project

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<sup>27</sup> D.98-12-075 at 34-39.

<sup>28</sup> D.98-12-076, mimeo. at 20-21.

in test years that were not built shall constitute a separate violation. In its MDRs submittal, Cal-Am identified five projects authorized in test years but not built. However, following a site inspection by ORA and a subsequent Data Request, the actual number of authorized projects that were not built came to 62, only four of which were part of the original MDRs submittal and the fifth of which was not included in the list of 62. Therefore, we find that there are a total of 58 separate offenses representing the 58 projects Cal-Am failed to disclose in the MDRs response. The resulting penalty is \$870,000, an amount calculated by taking \$15,000 per offense and multiplying that by 58 offenses.

The criteria under D.98-12-075 that we rely upon to assess this penalty is explained below.

### **2.2.1. Severity of the Offense**

In D.98-12-075, the Commission held that the size of a fine should be proportionate to the severity of the offense. To determine the severity of the offense, the Commission stated that it would consider the physical harm, economic harm, harm to the regulatory process, and the number and scope of the utility's violations.<sup>29</sup>

Cal-Am's Rule 1.1 violation misled the Commission and its customers into believing that Cal-Am completed authorized projects on schedule to the benefit of ratepayers. The factor that most clearly indicates the violation should be considered a grave offense is our general policy of according a high level of severity to any violation that harms or undermines the regulatory process. This

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<sup>29</sup> D.98-12-075 at 71-73.

factor must be weighed against the other factors mentioned above in evaluating the severity of the offense.

We conclude that Cal-Am's conduct harmed the regulatory process by failing to report material information in its MDRs submittal. In evaluating the MDRs, the staff was carrying out its regulatory duties to ensure Cal-Am completed its requested projects on schedule to the benefit of ratepayers. Without true and complete responses to the MDRs, the Commission's and staff's ability to properly assess and act upon Cal-Am's request for general rate increases was undermined. Indeed, without ORA taking the initiative to investigate this issue in addition to performing its regular duties in evaluating Cal-Am's application, the Commission may never have been made aware of this grave violation. Such actions add to economic harm to the public by undermining the Commission's ability to determine whether ratepayer funds are spent in a reasonable and prudent manner. The fact that economic harm may be hard to quantify does not diminish the severity of the offense or the need for sanctions.

Finally, we find that Cal-Am's sheer number of violations, totaling 58, also adds to the severity of the offense. Utility compliance with Commission rules is absolutely necessary to the proper functioning of the regulatory process. Disregarding a statutory or Commission directive violates the integrity of the regulatory process and breaks the regulatory compact between a utility and the public. Here, Cal-Am first provided only five projects as required under the MDRs rules in D.07-05-062, but later revised this to 62 projects following an ORA site inspection and data request. The scope of the discrepancy between information initially provided and information provided in response to

follow-up data requests by ORA is so significant that it warrants a severe penalty by the Commission.

### **2.2.2. Conduct of the Utility**

In D.98-12-075, the Commission held that the size of a fine should also reflect the conduct of the utility. When assessing the conduct of the utility, the Commission stated that it would consider a utility's action to prevent, detect, disclose and remedy a violation.<sup>30</sup>

Cal-Am failed to discuss any company rules or processes to prevent or detect inaccuracies and incompleteness in the MDRs before they were released to the Commission.<sup>31</sup> Indeed, Cal-Am admitted that at the time of the hundred-days update, the MDRs itself was inaccurate and there was no action taken to clarify, update, or provide the most recent accurate information.<sup>32</sup> Cal-Am stated that its conduct was "reasonable" because the company's interpretation of the MDRs was justifiable. However, Cal-Am offers an unimpressive justification as to why company management failed to include accurate information in the submitted MDRs. We decline to excuse such conduct.

Cal-Am also argues that it should not be subject to any penalty because its error was not intentional, and that the company did not set out to mislead the Commission.<sup>33</sup> However, during cross examination Schubert, Cal-Am's manager of capital assets and planning, stated that although the MDRs says nothing about

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<sup>30</sup> D.98-12-075, Appendix A.

<sup>31</sup> Reporter's Transcript 80:23 – 81:2 (Stephenson/CAW).

<sup>32</sup> *Id.* at 36:17-27.

<sup>33</sup> Cal-Am Opening Comments at 9.

“excluding projects that the utility believes will be built,” he still left out projects because he believed that they would be built.<sup>34</sup> Schubert admitted that this “was not an accident.”<sup>35</sup> We take Cal-Am’s intent when assigning the size of any penalty. Even if a violation may not have been willfully intentional, Cal-Am still should have made a more concerted effort to ensure the accuracy and integrity of the MDRs prior to its submission to the Commission. A utility should not avoid responsibility for the truthfulness of its representations to the Commission simply by neglecting to verify the completeness of material statements made by its employer or agents before releasing them to the Commission and staff.

In this instance, not only did Cal-Am fail to initially provide complete information to the Commission, but the company failed to promptly bring the nondisclosure to the Commission’s attention. The Commission and staff involved in the Cal-Am matter did not learn of the additional projects that were authorized in test years, but not built, until ORA conducted a site inspection and issued a subsequent data request. The fact that Cal-Am claims it disclosed the existence of projects authorized but not built in other sections of the company’s GRC application is irrelevant. The Rate Case Plan clearly states that accurate MDRs must be included when a GRC application is filed.<sup>36</sup> The Commission was disadvantaged by not receiving the omitted information at the time required under D.07-05-062. By Cal-Am not apprising the Commission of this information until after ORA conducted a field inspection and Cal-Am filed its data response,

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<sup>34</sup> *Id.* at 56:24, 57:18.

<sup>35</sup> *Id.* at 65:11-18.

<sup>36</sup> D.07-05-062, Appendix A.

the Commission's ability to determine whether Cal-Am completed authorized projects on schedule was undermined.

The Commission and staff might have discovered the existence of the additional unbuilt authorized projects through Cal-Am's testimony, work papers, and SCEPs; however, such discovery would have been incidental and not as a result of the direct MDRs requirements imposed on Cal-Am. The relevant point is that the Commission must be able to rely upon the representations made in response to MDRs and data requests in order to effectively protect the public interest. Whether the requested information may be independently available from other sources does not relieve a party from its Rule 1.1 obligations. Cal-Am was required to provide truthful and complete answers in its MDRs submittal and to exercise due professional care to ensure the integrity of information transmitted to the Commission and its staff. The Commission and staff were forced to discover the discrepancy for ourselves only after ORA conducted site visits to Cal-Am facilities and issued a subsequent data request.

Thus, based upon the criteria relating to the conduct of the utility, these failures on the part of Cal-Am weigh in favor of imposing a greater penalty.

### **2.2.3. Financial Resources of the Utility**

In D.98-12-075, the Commission held that the size of a fine should reflect the financial resources of the utility. When assessing the financial resources of the utility, the Commission stated that it would consider the need to deter future violations and the Constitutional limitations on excessive penalties.<sup>37</sup>

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<sup>37</sup> D.07-05-062, Appendix A.

We conclude that a \$870,000 penalty is significant enough to serve as an incentive to deter future violations. We also find that the amount of the penalty is not excessive in view of the financial resources available to Cal-Am. Cal-Am is owned by American Water Company, the second largest private water provider within California and the third largest in the country with assets in the billions of dollars.

#### **2.2.4. Totality of the Circumstances**

In D.98-12-075, the Commission held that a fine should be tailored to the unique facts of each case. When assessing the unique facts of each case, the Commission stated that it would review facts that tend to mitigate the degree of a utility's wrongdoing as well as facts that exacerbate the wrongdoing, while considering the public interest.<sup>38</sup>

From the public interest perspective, it is essential that the Commission have access to true and complete information from carriers in order to carry out the Commission's responsibilities to efficiently utilize ratepayer dollars. Cal-Am's violation impeded the Commission from exercising its obligations to protect the public interest. In considering the totality of circumstances and degree of wrongdoing in this case, we conclude that a penalty within the middle of the allowable range is appropriate.

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<sup>38</sup> D.07-05-062, Appendix A.

### 2.2.5. The Role of Precedent

In D.98-12-075, the Commission held that any decision that imposes a fine should (1) address previous decisions that involve reasonably comparable factual circumstances, and (2) explain any substantial differences in outcome.<sup>39</sup>

As precedent for considering the level of fines against Cal-Am, we consider past Commission decisions involving Rule 1.1 violations and the assessment of penalties. In D.12-12-053, fines were imposed on Pacific Gas and Electric Company relating to its failure to disclose information regarding errors in pipelines. In that decision, we imposed the maximum amount of \$50,000 per day as a continuing violation aggravated by the severity of the safety-related offense and the conduct of the utility, which resulted in the Commission issuing an \$11,450,000 penalty.

In D.01-08-019, fines were imposed on Sprint PCS (Sprint) relating to its failure to provide accurate data request responses to Commission staff. The Commission found a Rule 1.1 violation and measured the number of offenses at issue “in terms of each separate data element that Sprint failed to disclose in its data response. . . . The resulting penalty was \$200,000.”<sup>40</sup> The Commission stated that fining Sprint half of the maximum penalty allowed, \$10,000 per offense multiplied by twenty offenses, was sufficient to serve as deterrence.<sup>41</sup> Furthermore, the Commission found that the utility’s violation “harms or

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<sup>39</sup> *Id.*

<sup>40</sup> D.01-08-019 at 12.

<sup>41</sup> *Id.*

undermines the regulatory process,” which resulted in a finding that the violation “should be considered a grave offense.”<sup>42</sup>

In the instant proceeding, Cal-Am filed misleading MDRs responses. Cal-Am misrepresented the scope and extent of its construction activities in the prior rate case cycle when it filed its MDRs with the Commission. We conclude that for submitting misleading and factually incomplete MDRs, the \$15,000 per offense standard adopted for Cal-Am is within the general parameters we have applied in prior situations. In comparing Cal-Am’s offenses to those of other utilities, we take into account the importance of complete and truthful reporting of data as it relates to use of ratepayer dollars. Particularly given the increasingly critical nature of water rates in recent years, it has become vitally important to ensure that MDRs and data request responses are accurately and completely filed with the Commission so that ratepayer dollars can be allocated efficiently.

In the instant case, it is justifiable to impose a fine sufficiently large to send the proper message regarding the importance of accurate reporting to the integrity of the regulatory process. The \$15,000 per violation multiplied by the 58 undisclosed projects that were authorized but not built results in a total fine of \$870,000. The \$870,000 fine accomplishes this purpose. By adopting a penalty of \$15,000 per offense, we select a measure around the middle of the permissible range of \$500 to \$50,000 per offense as provided for by statute. By applying the penalty to each separate offense, the total penalty of \$870,000 is large enough to be consequential and is appropriate in view of the particular circumstances involved in this instance.

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<sup>42</sup> D.01-08-019 at 14.

### **3. Categorization and Need for Hearing**

In Resolution ALJ 176-3317, the Commission preliminarily categorized this proceeding as ratesetting, and preliminarily determined that hearings were necessary. As indicated on the record,<sup>43</sup> the OSC portion of the proceeding is adjudicatory.

### **4. Comments on Proposed Decision**

The proposed decision of ALJ Colbert in this matter was mailed to the parties in accordance with Section 311 of the Public Utilities Code and comments were allowed under Rule 14.3 of the Commission's Rules of Practice and Procedure. Comments were filed on March 26, 2015 by Cal-Am and the California Water Association (CWA). ORA late filed its comments on March 27, 2015. Cal-Am and ORA filed reply comments on April 1, 2015.

In their comments Cal-Am argued that the Cal-Am PD errs in finding it violated Rule 1.1. because, first, there is no indication that Cal-Am intended to hide the fact that some of its project were justifiably delayed, since extensive information on the status of previously authorized projects was available throughout the GRC materials; second, the record does not show that Cal-Am acted recklessly. The omission of certain projects from the MDR had no effect on rates and did not cause any harm to ratepayers and; third, even if the PD does not agree with Cal-Am's interpretation of the reporting requirement, its actions do not rise to the level of gross negligence.<sup>44</sup>

Cal-Am also argues that the PD's \$870,000 fine is unsupported and unjustified. Cal-Am asserts that: Its violation should be a single violation at

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<sup>43</sup> OSC Hearing TR, at 4:1-5.

<sup>44</sup> Cal-Am Comments to the PD, pg. 1

most. Even if each allegedly missing project is (incorrectly) considered a single violation, the PD includes projects that would have never been listed even under the most expansive definition of the reporting requirement; Second that the factors used to determine fines is incomplete, incorrect, and based on legal and factual errors; Third that fine is excessive compared to other fines imposed by the Commission and; Lastly even if there is a fine, it should be for 26 projects and not 58 projects because MDRs do not need to include 1) Advice letter projects, 2) multi-year projects, 3) a “completed project,” and 4) a special facilities fee project.<sup>45</sup>

CWA’s comments address the issue of whether Cal-Am’s failure to include certain information in its Response to MDRs is a material misrepresentation that should result in a Rule 1.1 violation.<sup>46</sup> CWA argues that Cal-Am provided information in various sections of its GRC application concerning all 62 of its “projects not built” and that the PD's assertion that "D.07-05-062 does not permit such information to be provided in a separate part of a utility's application other than the MDRs" is unsupported by and, in fact, inconsistent with-the language of the MDRs themselves.<sup>47</sup> CWA concludes that penalties should only be allowed if Cal-Am failed to provide references in its application of “plant improvements authorized in test years but not built.” CWA asserts that the rigid reading of the MDRs as requiring that all information responsive to the MDRs be provided in a

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<sup>45</sup> Cal-Am Comments to the PD at 8.

<sup>46</sup> CWA Comments to the PD at 1-2.

<sup>47</sup> *Id.* at 3.

document specifically designated for that purpose is not what the Rate Case Plan requires.<sup>48</sup>

In its comments ORA asserts that the Proposed Decision Imposing Sanctions for Violation of Rule 1.1 of the Commission's Rules, is well-reasoned, supported by the record, and will help to ensure that utilities provide accurate information to the Commission and its staff in the future.<sup>49</sup>

In its reply comments Cal-Am reiterates that: the PD erroneously claims that the Commission never set specific requirements for finding Rule 1.1 violations and that other Commission decisions explicitly state that Rule 1 violations require intent, recklessness or gross negligence; that CalAm did not intend to mislead the Commission; the PD erred in counting the number of violations which should have been a single violation and lastly; that the PD should have taken into account Cal-Am's financial resources and should explain why the fine is more severe than fines imposed on utilities with safety violations.<sup>50</sup>

In its reply comments ORA states that CWA's sanctions comments should be disregarded as they have misstated the issue.<sup>51</sup> ORA asserts that the issue is whether "California-American Water Company violated Rule 1.1 of the Commission's Rules by failing to file accurate MDR in its GRC application and not promptly correcting this material misstatement. The issue is not, as CAW states, "Does the Rate Case Plan Permit a Utility to Provide Information

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<sup>48</sup> CWA Comments to the PD at 7.

<sup>49</sup> ORA Comments to the PD at 1.

<sup>50</sup> Cal-Am Reply Comments to the at 1.

<sup>51</sup> ORA Reply Comments to the PD at 1.

Required by the [Minimum Data Requirements] in a Different Part of the Utility's Application or Testimony?"<sup>52</sup> ORA argues that CWA does not reference where the MDRs were cross referenced because they can't as it was not part of the application. Further, even when the projects were requested in discovery, Cal-Am made no cross-reference to the information contained in other sections of the application. It was not until after ORA's motion for an Order Instituting Investigation (OII) that Cal-Am first attempted to provide any form of cross-referencing and it was not until after ORA's site visit and data request RRA-001 that the undisclosed, unfinished projects were revealed.<sup>53</sup>

ORA argues that Cal-Am's comments merely rehash what CalAm stated in their response to the OII and briefs. ORA contends that Cal-Am's claim that even if there is a penalty then it should apply to 26 projects is erroneous because the MDR does not distinguish between Advice letter projects, multi-year projects, completed projects, or special facilities fee projects. Even if that was the criteria, then the number should be 45 and not 26.<sup>54</sup>

After reviewing the Comments and Reply Comments to the PD submitted by the Cal-Am, CWA and ORA, we have determined that Cal-Am and CWA have failed to demonstrate any material legal or procedural error in the PD. As a result, we decline to make any substantive changes to the PD based on alleged legal and/or procedural error.

We have modified the PD on our own initiative, in the following manner:

- Removed the term "generator-owned" from §2.2.3 of the PD

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<sup>52</sup> ORA Reply Comments to the PD at 1.

<sup>53</sup> ORA Reply Comments to the PD at 2.

<sup>54</sup> *Id.* At 3.

There are no other changes to the PD.

## **5. Assignment of Proceeding**

Carla J. Peterman is the assigned Commissioner and W. Anthony Colbert is the assigned ALJ and Presiding Officer in this proceeding.

## **Findings of Fact**

1. On July 1, 2013, Cal-Am filed its GRC Application, A.13-07-002, with the Commission. Pursuant to the Revised Rate Case Plan for Class A water utilities adopted in D.07-05-062, Cal-Am also submitted its responses to the MDRs.

2. The MDRs include a requirement that the utility provide a list of the plant improvements authorized in the test years but not built. In response to the MDRs, Cal-Am stated that five plant improvement projects authorized in the last GRC were not built and identified the five projects.

3. ORA conducted field visits to Cal-Am's various service territories, offices, and plants.

4. ORA determined that Cal-Am failed to complete a significant number of authorized projects far more than the five identified in Cal-Am's MDRs response.

5. Subsequently, ORA submitted a data request asking Cal-Am to identify all plant improvement projects that were authorized in the last GRC but not built.

6. In response to this data request, Cal-Am submitted a spreadsheet identifying 62 projects authorized in the previous rate case decision that had not yet been built, including four of the five projects that it had previously identified in its MDRs submittal.

7. Cal-Am provided information by including it in various sections of its GRC application. That information was provided in a completely independent context from the MDRs response at issue in this proceeding and was not responsive to the MDRs requirements.

8. Information regarding the status of the 62 projects authorized in test years but not built was in Cal-Am's possession on the date that Cal-Am submitted its MDRs response to the Commission.

9. Cal-Am failed to include 58 of 62 projects in its MDRs response to the Commission.

10 The penalty for a violation of Rule 1.1 is \$500 to \$50,000 per offense.

11 A total monetary penalty of \$870,000 results from applying a \$15,000 per violation to 58 separate violations.

### **Conclusions of Law**

1. Pursuant to Rule 1.1, any person that transacts business with the Commission agrees never to mislead the Commission or its staff by an artifice or false statement of fact or Cal-Am's actions in not disclosing relevant information concerning projects authorized in test years but not built caused the Commission and staff to be misled, and thereby constitutes a violation of Rule 1.1.

2. Cal-Am's omission from the MDRs response of information pertaining to authorized projects in test years but not built was a material misstatement.

3. The MDRs requires Cal-Am to list as discrete elements all projects that are authorized in test years but not built, the failure to provide information on each project authorized in test years, but not built, constitutes a separate violation.

4. Pub. Util. Code § 2107 provides for a penalty between \$500 and \$50,000 for each offense of a public utility which fails to comply with any order, decree, rule, direction, demand, or requirement of this Commission.

5. Cal-Am should be subject to penalties as a result of its Rule 1.1 violations.

6. Each failure to respond to the separate elements of the MDRs should be treated as a single offense.

7. The MDRs requires disclosure of Cal-Am's projects that were authorized in test years but not built as discrete elements. The failure to provide information on each project that was authorized in test years, but not built should constitutes separate offense for a total of 58 offenses.

8. A penalty of \$15,000 per offense represents approximately the middle of the range of penalties provided for under Pub. Util. Code § 2107.

9. The application of the criteria in D.98-12-075 to the facts in this case indicates that Cal-Am should pay a fine of \$870,000 for violating Rule 1.1 based on a penalty of \$15,000 per violation multiplied by 58 separate violations.

### **ORDER**

#### **IT IS ORDERED** that:

1. California-American Water Company must pay a penalty of \$15,000 per violation multiplied by 58 separate violations of Rule 1.1 for failing to accurately file Minimum Data Requirements in its General Rate Case application and not promptly correcting this material misstatement.

2. California-America Water Company must pay a fine of \$870,000 by check or money order payable to the California Public Utilities Commission and mailed or delivered to the Commission's Fiscal Office at 505 Van Ness Avenue, Room 3000, San Francisco, CA 94102, within 40 days of the effective date of this order. California-American Water Company shall write on the face of the check or money order "For deposit to the General Fund per Decision [TBD]."

3. All money received by the Commission's Fiscal Office pursuant to the preceding Ordering Paragraph shall be deposited or transferred to the State of California General Fund as soon as practical.

4. The Order to Show Cause on Rule 1.1 of the Commission's Rules of Practice and Procedure violations portion of this proceeding is closed.

This order is effective today.

Dated \_\_\_\_\_, at San Francisco, California.